

**BEFORE THE
ALCOHOL AND TOBACCO COMMISSION**

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|-----------------------------|---|-------------------------|
| WALGREEN CO. |) | Type 208 Application |
| d/b/a WALGREENS No. 5628 |) | Excise District No. 1 |
| 4445 CALUMET AVE. |) | |
| HAMMOND, INDIANA |) | |
| |) | |
| PERMIT NO. DL45-26758 |) | Lake County Local Board |
| |) | |
| Applicant-Petitioner |) | |

**PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

I.

BACKGROUND OF CASE

Petitioner, Walgreen Co., d/b/a Walgreens No. 5628, located at 4445 Calumet Avenue, Hammond, Indiana, Indiana (“Applicant” or “Walgreens”), applied for type 208¹ Alcohol and Tobacco Commission (the “Commission”) permit number DL45-26758 (“Permit”). Walgreens’ application for the Permit was assigned to the Alcoholic Beverage Board of Lake County (“Local Board”). The Local Board held a hearing on May 6, 2010 (“LB Hearing”) and voted 3-1 to deny the Permit, with the Excise Officer voting in favor of the Permit. On May 6, 2010, the Commission voted to deny the application for the Permit.

On June 1, 2010, Walgreens timely filed Petitioner’s Objection to and Request for Administrative Review and Hearing of the Commission’s Denial of Applications and Request for

¹ Liquor, beer, and wine (drug store) dealer permit in an incorporated area.

Consolidation of Appeals. Four (4) remonstrators petitioned to intervene in the appeals. Each of those petitions for intervention was denied.

The matter was set for hearing on August 24, 2010 ("ATC Hearing"), before Hearing Judge E. Edward Dunsmore ("Hearing Judge") and at that time, witnesses were sworn, evidence was heard, and the matter was taken under advisement. (ATC Hearing) The Hearing Judge also took judicial notice of the entire contents of the files related to the Permit in this case ("ATC File"). Having been duly advised of the facts and law at issue, the hearing Judge now submits these Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. EVIDENCE BEFORE THE LOCAL BOARD

- A. The following individuals testified before the Local Board in favor of the Applicant in this cause:
1. Alex C. Intermill, attorney for Applicant;
 2. Pedro Villarruel, Walgreens Store Manager for Store No. 5628, located at 4445 Calumet Avenue, Hammond, Indiana.
- B. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:

Permit DL 45-26758– Store No. 5628

1. Manager's Statement of Pedro Villarruel, Store Manager for Store No. 5628, which contained the following exhibits:
 - a. Exhibit 1 – Affidavit of Compliance Regarding Notice Posting, March 17, 2010
 2. Petitions of Support of the Applicant for Permit No. DL45-26758 at Store No. 5628, containing 274 customer signatures with 167 in favor of the application.
- C. The following individuals testified before the Local Board against the Applicant in this cause:
1. Kris Kantar, Hammond City Attorney.
 2. Mark Kalwinski, Councilman 1st District Hammond, IN.
 3. Bonnie Henry, concerned citizen.
 4. Janet Venecz, Community Watch.

- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause.
1. Permit No. DL45-26758 – 88 signatures stating a general objection to the issuance of an alcoholic beverage permit to Walgreens in Hammond, Indiana. There was no place to indicate being in favor of a permit.

III.

EVIDENCE PRESENTED BEFORE THE COMMISSION

- A. Walgreens, the sole party to this appeal, attended the ATC Hearing with its counsel, Lisa McKinney Goldner, Esq. and Alex C. Intermill, Esq., and two witnesses.
- B. Remonstrators Bonnie Henry and Kim Nordhoff attended the ATC Hearing and offered testimony against Permit No. DL45-26758, Walgreens Store No. 5628.
- C. Official notice was taken of the ATC File for this matter.
- D. The following testimony was offered at the ATC Hearing in favor of Walgreens:
1. Pedro Villarruel, Store Manager for Walgreens No. 5628, testified the information contained in his Manager's Statement, which was submitted at the LB Hearing, and his testimony before the Local Board regarding Walgreens' training and security measures, his experience at Walgreens, etc., remain correct and accurate.

Prior to the ATC Hearing, Walgreens conducted two separate polls, one before the LB Hearing and one before the ATC Hearing. The first poll sampled 274 customers, who were at least twenty-one years old, and 167 (61%) of those polled were in favor of the Permit. In the more recent poll taken after the LB Hearing, 101 of 132 (77%) of Walgreens customers over the age of twenty-one were in favor of the Permit. Approximately, 78% of the customers from the second poll listed Hammond as their address. Mr. Villarruel believes the signatures on the petitions provide a good representation of the community's desire for the Permit.

Customers continue to ask Mr. Villarruel and his employees when the store will sell alcohol.

Walgreens Store No. 5628 has had no violations for tobacco or other restricted product sales.

All customers purchasing alcohol will be carded and the cash registers will track each transaction, so that records can be checked to verify that cashiers are properly entering birthdates for alcohol sales.

2. Steve Gagne, District Manager for Walgreens, testified that the training and security measures to be utilized by Walgreens Store No. 5628 have been implemented without issue at other Walgreens that have already received alcohol permits in Lake County, and in Hammond, Indiana. There have been no issues with theft, security system malfunctions, or violations of alcoholic beverage laws at any of the Walgreens stores in Lake County that have permits.

Cash registers track each transaction, and in the event of an “exception”, Walgreens management will check the records to verify whether the cashier is properly handling alcohol sales.

Walgreens desires to provide a limited selection of wine and beer, an average of fifteen feet (15’), to answer the requests of its customers who have been asking for Walgreens to once again sell alcohol in its stores.

The alcohol will be located in the front of the store where it is highly visible to Walgreens employees.

Walgreens’ policy for tobacco is to card everyone who looks under forty (40); however, there is no state requirement to do so. Walgreens’ policy is to card everyone who desires to purchase alcohol. Walgreens has an excellent record for alcohol sales in Indiana.

- E. The following exhibits were admitted as part of the ATC Hearing record as evidence offered by Walgreens in favor of issuing the Permit:

1. Additional petitions collected by Walgreens, prior to the ATC Hearing, with approximately 132 Walgreens customer signatures with 77% in favor of the Permit. (Exhibit A – for Permit No. DL45-26758).

- F. The following testimony was offered at the ATC Hearing in opposition of Walgreens:

1. Bonnie Henry believes the district is “over-saturated” with liquor licenses; however, she acknowledges that Walgreens would serve customers that are not served by package liquor stores and bars.

Ms. Henry believes issuing a permit to Walgreens would result in more bottles being littered throughout the city.

2. Kim Nordhoff is a Walgreens' customer and believes Hammond has enough liquor licenses already.

Ms. Nordhoff testified regarding three (3) robberies that purportedly occurred in one (1) month at a 7-11 convenience store in Hammond. The store had surveillance cameras. Ms. Nordhoff has no first-hand knowledge of the security software 7-11 uses for its cash registers.

Ms. Nordhoff is over forty (40); however, she does not believe she looks over forty (40). She has only been carded once in the last two (2) years at Walgreens when purchasing cigarettes, which if she does not look over forty (40), suggests that Walgreens employees are not following their policy with respect to tobacco sales and may not follow the policies for alcohol sales either.

Ms. Nordhoff does not believe drugs and alcohol should be sold in the same store. She would never buy alcohol with her underage daughter present; although she understands it is legal to do so in Indiana.

Ms. Nordhoff testified that a person can live in Hammond, but have a Whiting or Robertsdale mailing address.

- G. The following exhibits were admitted as part of the ATC Hearing record as evidence offered by the remonstrators against the of issuing the Permit:

None

IV.

FINDINGS OF FACT

1. Walgreen Co. d/b/a Walgreens No. 5628, is the applicant for the Type 208 ATC Permit No. DL45-26758 (ATC File)
2. The Applicant meets the qualifications to hold a permit, pursuant to IC 7.1-3-4-2, IC 7.1-3-5-2, IC 7.1-3-10-2, IC 7.1-3-15-2, and 905 IAC 1-27-1. (LB Hearing; ATC Hearing)
3. Evidence was presented at the LB Hearing by Hammond City Attorney Kris Kantar, Hammond City Councilman, Mark Kalwinski, and Bonnie Henry, Chairman of the Crime Watch and Economic Development Committee for the City of Hammond, first district, that the residents in the neighborhood maintain that: a) the area is oversaturated with alcohol permits (without differentiating between permit types); b) there is no need or desire in the community for this permit and the residents in the area are consistently opposed to any new type of alcohol permit in the area; and c) the intersection where this permit would be located is traditionally one of the highest in volume of traffic accidents in the city.

4. Petitions were submitted as evidence as to the community need and desire for the Permit. The results of those petitions were: Walgreens submitted petitions at the LB Hearing totaling 274 signatures, of which 167 were in favor of the issuance of the Permit and 107 were opposed. Remonstrators submitted petitions at the LB Hearing with 88 signatures in opposition to the Permit. At the ATC Hearing, the Applicant submitted additional petitions containing signatures that were collected after the LB Hearing. The results of those petitions were: 132 signatures, with 101 in favor of and 31 opposed. Of all the petitions submitted by both Walgreens and Remonstrators at both the LB Hearing and the ATC Hearing, 268 people were in favor of the issuance of the Permit and 226 were opposed to its issuance. (LB Hearing; ATC Hearing; ATC File)
5. Petitioner contends the decision of the Local Board to deny the permit was not supported by substantial evidence. (Petitioner's Proposed Findings of Fact and Conclusions of Law; Appeal Hearing; ATC File)
6. Walgreens has extensive security measures to deter and prevent theft of alcohol and the sale of alcohol to minors. In addition, Walgreens' employees are thoroughly trained to avoid problems with theft and the sale of alcoholic beverages to minors and intoxicated people. (LB Hearing; ATC Hearing).
7. The Permits are not being placed within two hundred (200) feet of a church and/or school. (LB Hearing).
8. The Permits are being placed in commercial locations and are not being placed in residential areas, but are bounded by residential and neighborhood areas. (LB Hearing).
9. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

V.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to IC 7.1-1-2-2 and IC 7.1-2-3-9.
2. The permit applications were properly submitted pursuant to IC 7.1-3-1-4.
3. The Commission is authorized to act upon proper applications for permits. *Id.*

4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of the proceedings and exhibits before the local board. 905 IAC 1-36-7(a).
5. The Hearing Judge conducted a *de novo* review of the appeals on behalf of the Commission, including a public hearing and a review of the records and documents for each of the above-captioned matters in the Commission's file. IC 7.1-3-19-11(a); 905 IAC 1-36-7(a); *see also* IC 4-21.5-3-27(d).
6. Evidence at the ATC Hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on the matters officially noticed in the proceedings. 905 IAC 1-36-8; Ind. Code 7.1-3-19-11; Ind. Code 4-21.5-3-27(d).
7. The Applicant is a fit and proper applicant, has maintained a reputation for decency and law obedience, and is well qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1; IC 7.1-3-9-10.
8. Walgreens is not disqualified from holding an ATC permit. IC 7.1-3-4-2; IC 7.1-3-15-2
9. The ATC may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. 905 IAC 1-27-4.
10. In determining whether to issue a permit, the Commission shall investigate the desirability of the permit in regard to the potential geographical location of said permit. In making this determination, the Commission may consider, *but is not limited to the following factors*: (a) The need for such services at the location of the permit; (b) the desire of the neighborhood or the community to receive such services; (c) impact of such services on other business in the neighborhood or community; and (d) impact of such services on the neighborhood or community. 905 IAC 1-27-4.
11. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*
12. The Petitioner presented evidence of need and desire by customers for the services at the location in question. Evidence was presented, at the LB Hearing by Remonstrators and at the ATC Hearing, by witnesses that there is not a need and desire for such services at the location. Hence, the facts as to the application of 905 IAC 1-27-4 are clearly in dispute and must be weighed and decided according to the standards enunciated in Title 7.1 and case law interpreting it. Ind. Code 7.1 -2-3-7; Ind. Code 7.1-3-19-1 *et seq*

13. The Commission has discretion to issue or deny an application for a dealer's permit. Ind. Code 7.1-3-19-1; *Indiana Alcoholic Beverage Comm'n v. State ex rel. Harmon*, 269 Ind. 48, 379 N.E.2d 140 (1978).
14. The Commission may investigate an application for such a permit in whatever manner it deems best and may grant or refuse the application "as it deems the public interest shall be served best." Ind. Code 7.1-3-19-10; *Harmon*, 269 Ind.48, 379 N.E.2d 140.
15. The Commission must deny an application for a permit when a majority of the members of a local board recommend that the permit not be granted unless the commission determines, after *de novo* review, that to follow the recommendation would be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. Ind. Code 7.1-3-19-11(a); *Taylor Drug Stores, Inc. v. Indiana Alcoholic Beverage Comm'n*, 497 N.E.2d 932 (Ind. Ct. App. 1986).
16. The Commission may decline to follow the recommendation of a local board where the recommendation is unsupported by substantial evidence. *Id.*
17. The substantial evidence standard is met, if a reasonable person could conclude that the evidence and the logical inferences from such evidence are of such a substantial character and probative value as to support the administrative determination. *Indiana Alcoholic Beverage Comm'n v. Edwards*, 659 N.E.2d 631 (Ind. Ct. App. 1995).
18. The decision of the Local Board to deny the permit was based upon substantial evidence and in all other respects conformed to the requirements of Ind. Code 7.1-3-19-11(a). The Local Board heard testimony and reviewed petitions submitted by the Remonstrators regarding the community's need or desire for the grant of a permit to the Applicant, as well as the impact of the permit on the neighborhood, community and other businesses. Comments made by members of the Local Board and the Local Board Voting Sheet indicated the majority of the board felt there was not a need and/or desire for alcohol to be served at the proposed permit premises. Under 905 IAC 1-27-4, the Local Board must consider community need and desire in reaching their decision, as well as the impact of the permit on the neighborhood, community and businesses. The Local Board considered the evidence before it and based its decision on that evidence. (LB Hearing).
19. Any Conclusion of Law may be considered a Finding of Fact, if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the findings of the Lake County Local Alcoholic Beverage Board resulting in 3-1 vote concerning the denial of the Application for Permit Nos. DL45-26758, was supported by substantial evidence and the Alcohol and Tobacco Commission should **deny** said Application. The Application filed by Walgreen Co. d/b/a Walgreen Co., d/b/a Walgreens No. 5628 located at 4445 Calumet Avenue, Hammond, Indiana, for the Type 208 Alcohol and Tobacco Commission Permit No. DL45-26758, should be **DENIED**.

DATED: November _____, 2010.

E. Edward Dunsmore, Hearing Judge

Approved this _____ day of _____ 2010.

P. THOMAS SNOW, CHAIRMAN

DAVID JOHNSON, VICE CHAIR

DALE STURTZ, COMMISSIONER

FRANK GUTHRIE, COMMISSIONER